

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE DENARD BANKS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 263395

Calhoun Circuit Court

LC No. 05-000334-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (sexual penetration with a person at least age 13 but under 16), and was sentenced as a second habitual offender, MCL 769.10, to 10 to 22½ years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of third-degree CSC. We disagree.

This Court reviews a challenge to the sufficiency of the evidence *de novo* to determine if, when reviewed in the light most favorable to the prosecutor, the evidence could lead a rational trier of fact to conclude that all the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court will not interfere with the jury's role of determining the weight of the evidence and the credibility of witnesses, but instead draws all reasonable inferences and resolves credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

Defendant was convicted of third-degree CSC on a theory that he engaged in penile-vaginal sexual intercourse with the victim who was thirteen years old at the time. MCL 750.520d(1)(a). Defendant concedes that the victim was thirteen years old at the time of the incidents. But he claims that the lack of physical evidence, when considered with the testimony given at trial, stripped the victim's claim of any credibility. However, the "sexual penetration" element of third-degree CSC was satisfied by the victim's testimony that she and defendant twice engaged in sexual intercourse. And despite defendant's denial at trial that he engaged in sexual intercourse with the victim, he admitted to doing so during an interview with police. Therefore,

the prosecutor established all of the elements of third-degree CSC as charged in the present case. MCL 750.520d(1)(a).

We note that defendant's argument challenging the victim's credibility is a matter of weight, rather than sufficiency, of the evidence. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004). Moreover, the testimony of a criminal sexual conduct victim need not be corroborated in prosecutions under MCL 750.520d. MCL 750.520h. Defendant's challenge to the lack of physical evidence does not require his exoneration. The prosecution is not required to negate every reasonable defense theory. *Nowack, supra* at 400. Instead, "it need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.'" *Id.*, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). The jury was entitled to judge the credibility of the witnesses and determine the weight to give to the evidence. *Fletcher, supra* at 561-562. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to allow a rational jury to find that the elements of third-degree CSC were proven beyond a reasonable doubt.

Next, defendant argues that the trial court erred in scoring ten points for offense variable four (OV 4) and offense variable ten (OV 10) of the sentencing guidelines. We disagree. The trial court "has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). If there is any evidence to support a scoring decision, the decision will be upheld. *Id.*

Ten points is to be scored under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Additionally, ten points is to be scored if the serious psychological injury "may require professional treatment." MCL 777.34(2). "In making this determination, the fact that treatment has not been sought is not conclusive." *Id.*; see also *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004), lv gtd 474 Mich 1099; 711 NW2d 372 (2006). Here, defendant sexually assaulted the victim twice, and threatened that "people would be looking for her" if she told anyone about the assaults. As a result, the victim delayed reporting the assaults for approximately two weeks. She testified that she only reported the assaults because she thought she might be pregnant. Additionally, in her victim impact statement, she reported a "big change" in her life after the assaults. Only two of the victim's family members acted in a supportive manner toward the victim. Her friends and family members called her demeaning names, such as "slut," and some of her family members told her she got what she deserved for associating with people like defendant. The victim also reported experiencing nightmares that caused her to wake up crying and calling for her mother, because "I'm scared that someone close to him might come after me." We conclude that the evidence supported the trial court's scoring decision. See *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006) (information in victim impact statement supported scoring of OV 4).

Under MCL 777.40(1)(b), ten points must be scored for OV 10 where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

On appeal, defendant argues that he did not exploit the victim's age because she willingly participated in sexual intercourse with him. He contends that the proper score for OV 10 is five points due to exploitation of the victim through drugs and intoxication.

Defendant's argument is without merit. The victim testified that the assaults occurred after she had consumed alcohol provided to her by defendant, and after she had smoked marijuana. The evidence demonstrated that the victim submitted to sexual intercourse a second time after defendant impliedly threatened her. The threat occurred after the victim denied defendant's second request that she perform fellatio on him. The victim described this request as forceful in nature. At the time of the assaults, the victim was thirteen years old, and defendant was nineteen years old. While the existence of a factor such as youth, in and of itself, "does not automatically equate with victim vulnerability," MCL 777.40(2), we find that the evidence presented supports a conclusion that defendant manipulated and exploited the victim by taking advantage of her youth for selfish, unethical, and illegal purposes, such that a score of ten points was proper.

Under MCL 769.34(10), if a minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004). Evidence in the record supported the trial court's scoring of OV 4 and OV 10 at ten points each. *Hornsby, supra* at 468. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly